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VIA EMAIL: rulemakingprocesscomment@deltacouncil.ca.gov

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Re: Additional Comments on Proposed Rulemaking Package

Local Agencies of the North Delta (“LAND”)¹ previously submitted comments on the Rulemaking Package and Economic Analysis in a letter dated January 14, 2013. These comments supplement those previous comments. Our concern is that the proposed regulations are not easily understandable, have insufficient rationale, and are not the least burdensome, effective alternative. Moreover, the proposed regulations are both duplicative of, and inconsistent with, other statutory and regulatory authority. Last, the economic analysis of the Rulemaking Package is incomplete and misleading as to the economic costs to local communities and districts in particular. For these reasons, LAND requests that the Council revise the Rulemaking Package to conform with applicable requirements prior to submittal to the Office of Administrative Law.

Additional Comments on Proposed Regulations

LAND is concerned that several of the regulations proposed for adoption conflict with existing law. In particular, several terms within the Rulemaking Package are already defined in the California Environmental Quality Act (Pub. Resources Code, §§ 21000 et seq. (“CEQA”)) or its implementing regulations (Cal.Code Regs., tit. 14, §§ 14000 et seq.). For instance:

§ 5001, subdivision (c) “Feasible” - This definition is the same as in CEQA (Pub. Resources Code, § 21061.1). It is not clear why a duplicative definition is necessary for purposes of implementing the Delta Reform Act. In the CEQA context, the definition of

¹ LAND is a coalition comprised of reclamation and water districts covering about 90,000 acres in the northern geographic area of the Delta. LAND participants include: Reclamation Districts 3, 150, 307, 317, 407, 551, 554, 755, 813, 999, 1002, 2067 and the Brannon-Andrus Levee Maintenance District. Some of these agencies provide both water delivery and drainage services, while others only provide drainage services. These districts also assist in the maintenance of the levees that provide flood protection to homes and farms.

feasible is the means by which a lead agency determines whether project alternatives and/or mitigation measures should be adopted. The regulations should clarify whether the feasibility determinations for implementation of Delta Plan policies (such as setback levee feasibility) would be based on those same standards (including the judicial review standard) or whether some other approach to feasibility determinations is contemplated.

§ 5001, subdivision (s) “Significant impact” – This definition “a change in baseline conditions...” is inconsistent with the definition found in CEQA (Pub. Resources Code, § 21068, referring to “a substantial, or potentially substantial, adverse change in the environment”). The definition provided is confusing and uses several terms of art particular to CEQA (e.g., baseline, substantial impact, cumulative impact and project). As previously commented in the context of the Delta Plan policies and recommendations, the Delta Plan and any implementing regulations need to be clear about how they relate to existing requirements and definitions/terms of art that have been developed over the 40+ year life of the CEQA statute.

Other proposed regulations suffer from the same problems that the corresponding Delta Plan policy or regulation suffered from, which have not been corrected:

§ 5005 Reduced Reliance on the Delta through Improved Regional Self Reliance – As is the case with WR P1 and as described more fully in previous comments, it is still not clear exactly how water suppliers within the Delta are expected to show reduced reliance since no other water supplies are available besides Delta water. Moreover, water suppliers for agencies serving less than 25,000 acres must have a clear pathway to compliance other than preparing the water management plans from which they are specifically exempted in Water Code section 10853.

§ 5010 Expand Floodplains and Riparian Habitats in Levee Projects – The showing of infeasibility for setback levees appears to be a major financial and administrative burden on local reclamation and levee districts. (See above regarding lack of clarity on what that showing will entail.) Moreover, there does not seem to be a clear or meaningful distinction between what constitutes routine maintenance and operation and substantial rehabilitation and reconstruction. As explained in prior comments, setback levees are not appropriate in many circumstances within the Delta. They are also vastly more expensive to build, and often lead to destruction of existing structures and conversion of productive farmland. Last, the reference in subdivision (a) to reliance on future criteria to be developed by other agencies, departments, boards, etc. is impermissible in that it does not apprise the public of what standard is being proposed now for adoption.

§§ 5016, 5017 Floodway and Floodplain Protection – It does not appear that these provisions have been coordinated with existing requirements of the Central Valley Flood Protection Board. Moreover, the regulations should make clear that continued agriculture

in floodways and floodplains does not conflict with these provisions. Vegetation removal in such areas should also be specifically permitted.

Additional Comments on Cost Analysis and Economic Impacts of Regulations

LAND's prior comments illustrated some of the problems with Form 399 and the accompanying Cost Analysis. We would like to make the following additional points to assist in the correction of the deficiencies with the Council's economic analysis:

In general, Form 399 lacks clarity, which must be corrected. While some costs are shown, it is not clear over what time period the estimated costs would be incurred. Moreover, Attachment 1 (referenced repeatedly in Form 399) also does not provide this information.

Additionally, the proposed regulatory requirements are unreasonable, exceptionally complex and expensive, and lead to no new benefits associated with the co-equal goals. The new definitions, redefinitions, and sweeping scope of the proposed language takes previously exempted activities, due to their size and lack of impact, and reclassifies them, without any analysis of their impacts or the relative benefits that could occur. The justification of the costs is absent, the cost analysis is incomplete, and fails to accurately identify even the impacts that are described, let alone the significant number of undisclosed impacts.

The crux of the Cost Analysis appears to be that the most expensive levees, setback levees, would not be needed in every covered levee action, *therefore it is not consequential*. While the analysis is required for each levee project that is a covered action, useable criteria is not provided for that evaluation, and there is inadequate guidance for what constitutes the sole criterion, "feasible".

The Council's own analysis of the Plan shows the potential for tens to hundreds of millions of dollars of additional costs per year, yet assumes that these costs will somehow be borne by small rural communities and will have no impacts on employment or service provisions. These exorbitant costs will likely lead to severe economic and social hardships within the Delta, with the obvious direct and indirect result of the loss of agricultural jobs, productivity, ultimately risking the long-term viability of agriculture and increasing risk in the Delta.

The Cost Analysis provides a circular argument that additional costs for a covered action will not be incurred if the agency has already modified its project to be consistent with the Plan. (Cost Analysis, p. A-1.) The cost analysis also assumes that an agency can simply avoid completing any covered actions, such as levee upgrades, to meet current standards, without any resultant costs. The costs associated with compliance with the regulations are not only poorly identified but fail to identify the obvious direct and indirect costs from impacts associated with projects that *cannot or are not be completed*

because of the additional requirements and their costs. In particular, the Cost Analysis does not address the likely costs of *not completing* levee improvements as a result of the additional burdens imposed by the new regulations.

Moreover, as mentioned above, proposed section 5005 does not provide a clear pathway for compliance with the provisions for agencies otherwise exempted from preparation of water management plans due to their size under Water Code section 10853. For those agencies that are not, due to their size, required to prepare agricultural water management plans, it is incorrect for the Cost Analysis to assume that no additional costs would be incurred as a result of implementing section 5005. The lack of guidance for in-Delta water uses that might be covered actions in the future makes such costs even higher than they might otherwise be.

The text of section 5010: Expand Floodplains and Riparian Habitat in Levee Projects, misleads reader into assuming that approximately half of the Delta levees would already need analysis for setback levees. (Cost Analysis, p. 16.) However, the text of the Central Valley Flood Protection Plan (“CVFPP”) does not support this assumption. Instead, the CVFPP instead explains that “At selected levee setback locations in Sacramento and San Joaquin river basins,” setback levees should be “consider[ed],” “may be used...where economically feasible,” and “where setback levees for multiple benefits prove feasible.” The CVFPP also proposes a “greater cost-share” for setback levees. (See 2012 CVFPP, June, 2012, pp. 2–15, 3-4, 3-7, 3-11, 3-44, 4-20, available at: <http://www.water.ca.gov/cvfmp/docs/2012%20CVFPP%20FINAL%20lowres.pdf>.) Finally, there is no cost breakdown provided in the illustration that provides the detail required for Form 399. Form 399 should disclose the sum total cost per mile of new setback levees that could be required as a result of this plan as compared to existing requirements.

In order to minimize cost burdens from implementation of the Delta Plan, additional work on the Certification of Consistency Form for Covered Actions to make it understandable for local Delta districts. The Certification of Consistency Form for Covered Actions for consistency with WR P1 appears to require that all three of the reduced reliance measures be met. (Exhibit A to Cost Analysis, pp. 3-4.) As described in prior comments, these measures are unnecessary and unreasonable for in-Delta water users with no alternative water supplies. A pathway for in-Delta water users to comply with WR P1 must be provided.

The Certification of Consistency Form also identifies the levee evaluation requirement for ER P4, but provides no specificity for how that requirement will be met. (Exhibit A to Cost Analysis, p. 5.) This places small district engineers in the position of completing potentially complex and expensive analyses without any guidance. Such

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guidance would assist local districts in making decisions about which projects would meet the feasibility criteria.

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Thank you for considering these comments; we are available to consult further regarding any questions staff may have about them. In particular, we are willing to work with Council staff to help make the Cost Analysis more accurate so that a realistic picture of the costs of implementing the Rulemaking Package can be presented to the public.

Very truly yours,

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